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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RYAN Q. CLARIDGE,

Plaintiff,

vs.

I-FLOW CORPORATION, a Delaware corporation; I-FLOW, LLC, a Delaware limited liability company; DJO LLC (f.k.a. DJ ORTHOPEDICS, LLC), a Delaware limited liability company; DJO, INCORPORATED, aka DJO, INC., a Delaware corporation; STRYKER CORPORATION, a Michigan corporation; and STRYKER SALES CORPORATION, a Michigan corporation,

Defendants.

CASE NO.: 2:18-cv-01654-GMN-PAL

DEFENDANTS STRYKER CORPORATION AND STRYKER SALES CORPORATION'S REPLY IN SUPPORT OF MOTION TO DISMISS AND STRIKE PORTIONS OF THE COMPLAINT

Defendants Stryker Corporation and Stryker Sales Corporation ("Defendants" or "Stryker") hereby file this Reply in support of their Motion to Dismiss and Strike Portions of Plaintiff Ryan Q. Claridge's ("Plaintiff") Complaint.

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This Reply is based on the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument this Court may consider.

DATED this 25th day of January, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Opposition to Stryker's Motion does nothing to save his claims. The reality remains that the Complaint lacks the necessary and essential facts to maintain the challenged claims under applicable law, and the majority of cases cited in opposition are inapplicable, not controlling, and/or distinguishable from the claims made herein. Specifically, Plaintiff's causes of action for misrepresentation, fraudulent concealment, and punitive damages cannot be maintained because Plaintiff failed to meet the requisite pleading requirements. Indeed, the specific and necessary factual detail to assert these claims is entirely absent from the Complaint, and the allegations that are present, have been asserted jointly against separate corporate defendants. Further, the claims for breach of implied warranty should be dismissed as there is no relationship between Stryker and Plaintiff. Because Plaintiff cannot invent or manufacture facts to maintain these claims, they should be dismissed or stricken from the Complaint, without leave to amend, pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure.

II. ARGUMENT

Pleadings which fail to set forth factual allegations to support asserted legal conclusions should be dismissed. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555; *see also*, *Iqbal*, 129 S. Ct. at 1950 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). Only substantive allegations of fact are presumed to be true when resolving a Rule 12(b)(6) motion. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). Allegations that are (1) contradicted by judicial notice or exhibit, (2) conclusory, (3) require unreasonable inferences, and (4) require unwarranted deductions of facts are not entitled to a presumption of truth or to credibility for purposes of a motion to dismiss. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). Courts do not assume the truth of legal conclusions when they are phrased as factual allegations in the Complaint and courts should not assume as true facts that a plaintiff has not alleged. *Whitehorn v. F.C.C.,* 255 F. Supp. 2d 1092, 1095 (D. Nev. 2002); *see also Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 526 (1983).

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A. THE CLAIMS FOR MISREPRESENTATION AND FRAUDULENT CONCEALMENT DO NOT MEET THE REQUISITE PLEADING STANDARD (SIXTH CAUSE OF ACTION).

In his Opposition, Plaintiff does not dispute that a party "must state with particularity the circumstances constituting fraud," but then claims – through reliance on inapplicable authorities – that Plaintiff is not required to spell out the "the who, what, when, where, and how" of the misconduct to maintain his fraud based claims. [Opposition, pp. 9 – 12.] At the same time, Plaintiff seems to invent an entirely new but lesser standard for pleading fraud by relying on inapplicable out-of-state cases and misapplying them to this action. [*See* Opposition, *i.e.,* footnote 38 – 44, where not one Nevada authority is cited.]

Nevada law is clear that Plaintiff must adequately plead fraud allegations with sufficient particularity, and Rule 9(b)'s heightened pleading requirements apply with full force. *Fed. R. Civ. P.* 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); *LT Int'l Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d 1238, 1244 (D. Nev. 2014) ("It is well-settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement"). More specifically, and contrary to Plaintiff's statements in the Opposition, a complaint in Nevada alleging fraud **must** include allegations of the time, place, and specific content of the alleged false representations as well as the identities of the parties involved. *See Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

The heightened pleading standard of Rule 9(b) serves "not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing [on] the court, the parties and society enormous social and economic costs absent some factual basis." *Cafasso v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1057 (9th Cir. 2011) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001)); *Tropicana Entm't Inc. v. N3A Mfg.*, 2017 U.S. Dist. LEXIS 53032, at 11-12

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In light of the applicable authorities, and despite Plaintiff's unsupported claims to the contrary, Plaintiff must state fraud allegations with particularity, which requires specific detail concerning the time, place, and manner of each act of fraud, as well as the "who, what, when, where, and how" of the proposed misconduct--all things that are missing from Plaintiff's Complaint. *Tropicana Entm't Inc. v. N3A Mfg.*, 2017 U.S. Dist. LEXIS 53032, at 11-12; *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th. Cir. 2003); *Lancaster Community Hospital v. Antelope Valley Hospital District,* 940 F.2d 397, 405 (9th. Cir. 1991). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner,* 780 F.2d 727, 731 (9th Cir. 1985).

Here, Plaintiff fails to cite any 9th Circuit authorities to support his contention that these strict requirements do not apply to the fraud based claims in this case. Rather, Plaintiff relies on a slew of out-of-state decisions where different and/or lesser requirements were found to be sufficient during the pleading stage of the action. *See, i.e.*, *McIntosh v. Stryker Corp*., 2010 U.S. Dist. LEXIS 127037, at 7; *Mack v. Stryker Corp*., 2010 U.S. Dist. LEXIS 114946, at 6 [both Minnesota actions where the Court did not fully apply the heightened pleading requirements for fraud claims].

Simply providing general and conclusory statements 9 -- as Plaintiff has done here – is not enough to maintain these causes of action. Entirely lacking from the Complaint is any information to put Stryker on notice as to the specific details of the misrepresentation and fraudulent concealment claims that it allegedly engaged in. There is no information in the Complaint concerning what specific representations Stryker made--either to plaintiff, his surgeon, or in general – that were false or misleading. When did the purported misrepresentations or concealment occur? Who from Stryker was involved? How did it occur? The answers to all of these basic questions – which are requirements to maintain these very serious claims against any defendant – are conspicuously absent from the Complaint. Courts have dismissed complaints that fail to set forth who, what, where, when and how. *See Heesch v. Stryker Corp*., 8:11-cv-01430-R-SS 2012 U.S. Dist. LEXIS 199844 (C.D. Cal 2012) ("the Complaint lacks facts specific enough

to maintain this claim …. Further lacking are details concerning the proposed misconduct by Stryker, when and how it occurred, or the persons and locations involved for these defendants and Plaintiff").

Plaintiff's failure to meet the requisite pleading standard is even more apparent when considering that every allegation in the Complaint is jointly asserted against Stryker and I-Flow, without any differentiation between two distinct corporate entities. While Stryker and I-Flow happened to sell similar medical devices, these separate corporate entities have no connection or special relationship to each other and none has been alleged in the Complaint. The devices from the respective companies have distinct regulatory histories and 510(k) submissions. I-Flow's and Stryker's devices were manufactured in different places, at different times, and have features that are unique to each other. While Plaintiff alleges that the same physician performed Plaintiff's two surgeries, it cannot be disputed that Stryker's device was sold to a different hospital and prescribed at a different time by Plaintiff's surgeon in his sound medical judgment and sole discretion.

Stryker's pain pump had its own warnings and instructions for use that were applicable at the time of Plaintiff's alleged surgery in January 2006 [and available to Plaintiff's surgeon] when the Stryker device was purportedly used, which is obviously a different procedure from the surgery where the I-Flow device was used in August 2005. [Complaint, pp. 2 – 6.] Given the vast differences and circumstances surrounding the two medical procedures that necessarily apply to I-Flow and Stryker (i.e., different hospitals, different medical devices, different time periods, different surgical procedures, just to name a few), it is evident that Plaintiff has not pled facts sufficient to meet the heightened pleading standard. It is literally impossible that the same misrepresentation and fraud allegations can be made against Stryker and I-Flow jointly, yet still met the specificity requirement under Rule 9. As a result, Plaintiff's sixth cause of action should be dismissed on this basis alone.

In fact, this very Court has dismissed similar causes of action when the same general and conclusory allegations are asserted against multiple defendants jointly. *See Tropicana Entm't Inc. v. N3A Mfg.*, 2017 U.S. Dist. LEXIS 53032, at 13 ("the particularity requirements of Rule 9(b) do

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not allow a complaint to merely lump multiple defendants together in general allegations"). Rule 9(b) requires plaintiffs to "differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Id.* Because Plaintiff has made no attempt to differentiate or specify his allegations as to each individual defendant, this cause of action is properly dismissed.

B. PLAINTIFF CANNOT MEET THE HEIGHTENED PLEADING REQUIREMENT NECESSARY TO ASSERT A CLAIM FOR PUNITIVE DAMAGES.

As was true with Plaintiff's misrepresentation and fraudulent concealment claim, Plaintiff has not, and cannot, meet the necessary pleading requirements to maintain this egregious claim for relief. Contrary to the Opposition, Plaintiff's demand for punitive damages is appropriately stricken from the Complaint pursuant to Rule 12(f), or properly dismissed pursuant to Rule 12(b)(6). [Opposition, pp. 12-15.] The fact that Plaintiff simply included this demand in his prayer for relief is mere semantics. Plaintiff offers no applicable support for his claim that the demand for punitive damages cannot be challenged under Rule 12(b)(6) and (f).[1] Rather, Plaintiff's argument lacks merit and should be disregarded because Nevada District Courts routinely strike claims for punitive damages under Rule 12(f). *See, i.e., Corral v. Homeeq Servicing Corp*., 2010 U.S. Dist. LEXIS 111208, at 17-18 (Court striking claim for punitive damages under Fed. R. Civ. P. 12(f)).

In his Opposition, Plaintiff argues that he asserted specific facts to meet the heightened pleading requirements, but his proposed specificity cites to nothing more than general allegations within the Complaint and Opposition itself that include no facts at all as to Stryker, and instead include broad and sweeping generalizations as to multiple defendants. [Opposition, pp. 13-15.]

[1] Rule 12(f) provides that a court "may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993). "Immaterial" matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded" and "'[i]mpertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question.'" *Id.* Here, plaintiff's demand for punitive damages is immaterial, as he has not met the requisite pleading standard to include this claim in his Complaint [whether or not it was included as an independent cause of action]. Similarly, elements of the complaint that fail to state a claim are appropriately dismissed under 12(b)(6).

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This type of generalized and non-specific pleading is insufficient to maintain this serious claim for relief.

Nevada courts have historically disfavored punitive damages claims and, for that reason, impose rigorous pleading and proof requirements. *See* Nev. Rev. Stat. § 42.001 *et seq.* Specifically, under Nev. Rev. Stat. § 42.005, punitive damages may be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied . . ." Thus, to sustain a claim for punitive damages, Plaintiff is required to allege specific facts in the Complaint demonstrating that Stryker acted with fraud, oppression, and/or malice.[2] *See Twombly*, 550 U.S. at 555, 570. To allege malice, Plaintiff must plead facts showing the defendant's conduct was despicable and engaged in with a conscious disregard for the rights or safety of others. This type of conduct with respect to Stryker is entirely lacking from the Complaint. Further, Rule 9(b) requires that fraud be pled with particularity – and as discussed above – none of Plaintiff's allegations are set forth with any particularity as to any type of fraudulent conduct by Stryker.

Not only has Plaintiff failed to allege sufficient facts to support the recovery of this extraordinary claim for relief, Plaintiff's claim for punitive damages fails against Stryker for another reason. Here, California law is also instructive on the strict pleading required to sustain a claim of punitive damages in Nevada against a corporate defendant.[3] A plaintiff seeking punitive damages against a corporate defendant bears the additional burden of pleading that an "officer, director or managing agent of the corporation" had "knowledge, authorize[ed], or ratif[ied]" the conduct warranting punitive damages. *Grieves v. Superior Court*, 157 Cal.App.3d 159, 167-168

[2] Nev. Rev. Stat. § 42.001 narrowly defines the oppression, fraud and malice required to support a punitive damages claim as follows: 'Fraud' means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person. 'Malice, express or implied' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

[3] Nevada's statute on punitive damages is a copy of the California punitive damages statute. *See* NRS 42.005; *see* Cal. Civ. Code § 3294. When a statute, such as Nevada's punitive damages statute, is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state. *Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 3, 786 P.2d 22, 23 (1990). Consequently, substantial weight is given to opinions of the California appellate courts in their construction of California statutes subsequently adopted by Nevada.

(1984); *see also Frantz v. Johnson*, 999 P.2d 351, 360 n.8 (Nev. 2000) ("a corporation is liable for damages committed by an agent employed in a managerial capacity acting within the scope of employment as a matter of law"). Since Plaintiff's Complaint fails to satisfy this further, independent pleading requirement, the demand for punitive damages is therefore insufficient as a matter of law and properly dismissed. *See, e.g., Grieves*, 157 Cal.App.3d at 167-168 (1984).

C. PLAINTIFF'S CLAIMS FOR BREACH OF IMPLIED WARRANTY CANNOT BE SUSTAINED (FOURTH AND FIFTH CAUSES OF ACTION).

Nevada law recognizes two types of implied warranties: (1) implied warranty of merchantability and (2) implied warranty of fitness for a particular purpose. *Forest v. E.I. DuPont de Nemours & Co*., 791 F. Supp. 1460, 1469 (D. Nev. 1992). Here, Plaintiff asserts causes of action for both implied warranties. To state a breach of warranty claim under Nevada law, a plaintiff must establish three elements: (1) a warranty existed; (2) the defendant breached the warranty; and (3) the defendant's breach was the proximate cause of the plaintiff's damages. *Nevada Contract Servs., Inc. v. Squirrel Cos. Inc*., 119 Nev. 157, 68 P.3d 896, 899 (Nev. 2003).

The implied warranty of fitness for a particular purpose provides "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that *the buyer is relying on the seller's skill or judgment* to select or furnish suitable goods … an implied warranty that the goods shall be fit for such purpose." NRS 104.2315 (emphasis added). Thus, the implied warranty of fitness for a particular purpose requires buyer *reliance* on the seller. *Id.* Plaintiff's claim for breach of implied warranty of particular purpose must fail because the Complaint lacks any allegations that Stryker made any warranty to Plaintiff, or that Plaintiff relied on Stryker's skill or judgment [the instructions for use accompanying the pain pump were directed to the surgeon, not Plaintiff]. Indeed, the plaintiffs in the *Reed* case (that Plaintiff heavily relies on) did not assert a claim for breach of the implied warranty for particular purpose. *Reed v. Arthrex, Inc*., No. 317CV00337LRHWGC, 2017 WL 4560140, at *3 (D. Nev. Oct. 11, 2017).

Further, Plaintiff's claim for breach of implied warranty of merchantability fails because there are no allegations explaining how any warranty was breached or how that purported breach

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allegedly caused Plaintiff any harm. [See Opposition, p. 9.] Critically, Plaintiff does not dispute Stryker's contention that privity is required, but focuses on the "type" of privity that is required, concluding that "horizontal" privity is the only necessary to assert these claims.[4] [Opposition, pp. 5-6.] Plaintiff, however, fails to complete this analysis.

Horizontal privity is "[a] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such persons may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section." NRS § 104.2318. But Stryker did not make any warranties – either express or implied – to Plaintiff or anyone in his household. While Nevada may not always require vertical privity in actions for personal injury caused by defective products, it still requires the horizontal privity mandated by the statute. *Zaika v. Del E. Webb Corp*., 508 F. Supp. 1005, 1012 (1981); *Hiles Co. v. Johnston Pump Co. of Pasadena*, 93 Nev. 73, 560 P.2d 154, 157 (1977); *Amundsen v. Ohio Brass Co.*, 89 Nev. 378, 513 P.2d 1234 (1973); *Long v. Flanigan Warehouse Co*., 79 Nev. 241, 382 P.2d 399 (1963). Indeed, the *Long* Court noted that the law of negligence and strict liability was the appropriate vehicle for a non-privy to obtain relief in these situations. *See id.* at 403. In other words, claims for a breach of the implied warranty is in the present case are superfluous in light of the products liability claims.

It is undisputed that Plaintiff is not party to any agreement with Stryker, and the Complaint is devoid of any facts suggesting such a condition or any other grounds to assert the existence of privity. Plaintiff simply claims to have been prescribed a pain pump by his treating physician; there was no relationship between Stryker and Plaintiff and no circumstances under which such a relationship could be formed. Notably, Plaintiff recently agreed to dismiss his claim for Breach of Express Warranty following meet and confer efforts between the parties [see

[4] A claim of implied warranty requires privity between the buyer and seller. *Finnerty v. Howmedica Osteonics Corp.*, No. 214CV00114GMNGWF, 2016 WL 4744130, at *7 (D. Nev. Sept. 12, 2016) (dismissing breach of implied warranty claims against a manufacturer of a surgical knee replacement product for lack of privity); *see also Gillson v. City of Sparks*, No. 03:06-CV-00325-LRH-RAM, 2007 WL 839252, at *5 (D. Nev. Mar. 19, 2007) ("[A] claim for breach of implied warranty cannot be maintained in the absence of privity."); *Long v. Flanigan Warehouse Co.,* 382 P.2d 399, 402 (Nev. 1963).

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Exhibit A, attached hereto, which is an email reflecting Plaintiff's agreement to dismiss his third cause of action].

In short, Plaintiff simply does not come within the class of persons protected by the statute. Therefore, Stryker's motion to dismiss both implied warranty claims should be granted. *See Zaika,* 508 F. Supp. at 1012.

III. LEAVE TO AMEND THESE CAUSES OF ACTION SHOULD BE DENIED

Plaintiff cannot assert sufficient facts to maintain the claims and causes of action discussed herein and, therefore, leave to amend is properly denied. *BP West Coast Products LLC v. SKR Inc.*, 989 F. Supp. 2d 1109, 1116 (W.D. Wash 2013) (citing *United States v. SmithKline Beecham Clinical Labs.*, 245 F. 3d 1048, 1052 (9th Cir. 2001)) (leave to amend should not be granted when amendment would be futile; futility alone is enough to refuse amendment).

IV. CONCLUSION

Plaintiff's Complaint lacks the necessary and specific facts to maintain his claims for fraudulent concealment, misrepresentation, punitive damages, and breach of implied warranty. For these reasons, the claims and causes of action discussed herein are properly dismissed or stricken from the Complaint.

DATED this 25th day of January, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANTS STRYKER CORPORATION AND STRYKER SALES CORPORATION's REPLY IN SUPPORT OF MOTION TO DISMISS AND STRIKE PORTIONS OF THE COMPLAINT** by the method indicated below and addressed as follows:

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by , a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED this 25th day of January, 2018.

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